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No. 95-21

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JUDITH MCAULIFFE, CHARLES DECUIRRE, YOLANDA PEPPER, JOANN SERPICO, FAY SHIN, AND PATRICIA BEST,

Petitioners,

v.

SHERWIN MANOR NURSING CENTER, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a business owned by Orthodox Jews that has been subjected by state officials to unique administrative burdens because of the officials' manifest hostility to Orthodox Jews may maintain an action under 42 U.S.C. § 1983 for violation of its constitutional right to equal protection of the laws.

2. Whether such a business may maintain an action under 42 U.S.C. § 1983 for violation of the constitutional guarantee of free exercise of religion.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

The respondent ("Sherwin Manor") is a nursing home owned and operated by Orthodox Jews, and its residents are largely Jewish. In December 1991, six surveyors of the Illinois Department of Public Health performed Sherwin Manor's annual licensure and certification survey. Motivated by anti-Semitism, the surveyors fabricated allegations against Sherwin Manor and submitted a 124-page

report filled with false and meritless allegations. During the course of the survey, the Public Health officials made a number of outrageous remarks that manifested their religious prejudice:

> "They are Jews, you can't trust them."
>
> "She's a Jew and a liar — you can't trust her."
>
> "These Jews, they have Pollacks who can't read or speak English."
>
> "These Jews, they don't tell anyone they have a Kosher kitchen."
>
> "They are terrible, vicious rotten people."

On receiving a copy of the report — which included 28 false findings of federal violations that resulted in the immediate initiation of federal decertification proceedings — Sherwin Manor hired counsel who bypassed the ordinary administrative appellate process and presented taped, documentary and photographic evidence to supervisory personnel at the Department of Public Health. Sherwin Manor was forced to take this extraordinary action because, among other things, the surveyors' false report threatened the facility with the potential loss of Medicare and Medicaid funds before any normal administrative appeal could be concluded. As a result of its presentation, the supervisors withdrew 73 pages of the surveyors' findings, unconditionally renewed Sherwin Manor's state license, and recommended to federal authorities that Sherwin Manor be recertified.

Sherwin Manor thereafter filed a complaint under 42 U.S.C. §§ 1983 and 1985(3) against the surveyors seeking damages and attorneys' fees for constitutional violations. The defendants moved to dismiss, and the district judge granted the motion on the ground that Sherwin Manor "has not suffered an actual constitutional injury" (Pet. App. C-5). The district judge held that Sherwin Manor had taken advantage of "an adequate post-deprivation remedy" (Pet. App. C-6).

Sherwin Manor then filed a motion under Rule 59(e) of the Federal Rules of Civil Procedure, elaborating on its Equal Protection and Free Exercise of Religion claims. The district judge rejected the equal protection claim on the ground that Sherwin Manor was given the same right as other nursing homes to present evidence to a review board to review violations (Pet. App. C-14). She also rejected the free exercise claim on the ground that Sherwin Manor had suffered no "deprivation or penalty" (*id.*).

On appeal, the Seventh Circuit reversed the dismissal of the complaint and remanded for a trial. The court of appeals held that Sherwin Manor had a "cognizable equal protection claim" because "it was subjected to differential treatment by the state surveyors based upon the surveyors' anti-Semitic animus" (Pet. App. A-7). The court of appeals distinguished, in this regard, between a procedural due process injury, which "does not typically arise until the proceedings are at a mature state," and claims based on the Equal Protection Clause and the Free Exercise Clause, which may be asserted if the claimants are discriminatorily subjected to "special administrative burdens" because of their religion. The Seventh Circuit panel distinguished the Seventh Circuit cases on which the petitioners had relied for the proposition that there was no cognizable constitutional injury if "random and unauthorized acts" are remedied by usual appellate procedures.

REASONS FOR DENYING THE WRIT

I

THE CIRCUITS AGREE ON THE RULE GOVERNING EQUAL PROTECTION CLAIMS

Petitioners acknowledge that there is no conflict among the Circuits. With this decision, the Seventh Circuit joins the Sixth and the Eighth Circuits, which have held that an equal protection claim may be made even by a party who has an available state remedy. *See Watts v. Burkhart*, 854 F.2d 839, 842 (6th Cir. 1988); *Williams v. City of St. Louis*, 783 F.2d 114, 118-119 (8th Cir. 1986).

The Ninth Circuit also sustained a similar claim in *Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980), *cert. denied*, 449 U.S. 875 (1980), and the Seventh Circuit discussed and relied on that precedent in this case (Pet. App. A-8). Even assuming *arguendo*, therefore, that Sherwin Manor had an "available state remedy," the decision below permitting it to proceed with a Section 1983 action to redress the equal protection violation is consistent with the uniform trend of decisions in the various circuits.

In *Zinermon v. Burch*, 494 U.S. 113, 125 (1990), all Justices of the Court recognized that the rule of *Parratt v. Taylor*, 451 U.S. 527 (1981), was limited to procedural due process claims. This Court has thus made it clear, after the Sixth and Eighth Circuit decisions, that *Parratt* does not bar Section 1983 actions for substantive constitutional violations. *Cf. Albright v. Oliver*, 114 S. Ct. 807, 819 (1994) (Kennedy, J., and Thomas, J., concurring in the judgment) (the *Parratt* rule applies to suits based on "the Due Process Clause of the Fourteenth Amendment *simpliciter*").

II

SHERWIN MANOR WAS COMPELLED TO INVOKE AN EXTRAORDINARY REMEDY

Petitioners misstate this case and the issue it presents when they assert that Sherwin Manor "successfully avail[ed] itself of an established administrative remedy" (Pet. i; *see* Pet. 4, 6). Had it invoked the usual state remedy, it would have suffered irreparable harm. In fact, Sherwin Manor secured a correction of the fabricated and false report only because it was forced to bypass the "available state remedy" and demonstrated, to the satisfaction of the Department of Public Health supervisors, that the surveyors had acted outrageously.

The issue presented by this case, therefore, is whether an action under Section 1983 may be maintained to obtain redress for an equal protection violation where damages were mitigated somewhat by an extraordinary recourse to high-level government personnel. That issue has not been the subject of other litigation and does not, at this juncture, warrant review by this Court.

III

SHERWIN MANOR'S CONSTITUTIONAL LIBERTY UNDER THE FIRST AMENDMENT IS WELL ESTABLISHED

Citing a 1977 decision of the Fifth Circuit, petitioners assert that there is a serious question as to whether an institution, as opposed to an individual, may invoke the Free Exercise of Religion Clause of the First Amendment (Pet. 10). This Court's decisions after 1977 have firmly

established the availability of such a right. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 603-04 (1983); *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 390-92 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993). It is now "settled law" that religious institutions "may sue to vindicate organizational interests protected by the free exercise clause of the First Amendment." *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 521 (9th Cir. 1989).

IV

REVIEW AT THIS JUNCTURE WOULD BE PREMATURE

In any event, the Seventh Circuit's decision reversed dismissal of the complaint and remanded the case for discovery and trial. There is, as yet, no judgment on the merits. Review by this Court at this stage of the case would, therefore, be premature.

This Court has traditionally been reluctant to review decisions of federal courts of appeals that are not final judgments. *See, e.g., Virginia Military Institute v. United States*, 113 S. Ct. 2431-32 (1993) (Scalia, J., concurring); *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting); *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967); Stern, Gressman, Shapiro & Geller, Supreme Court Practice 195-196 (7th ed. 1993). If Sherwin Manor ultimately prevails at trial and an important issue concerning the meaning or application of 42 U.S.C. § 1983 is presented by that judgment, it may be reviewed at that juncture in this Court. Compare, *e.g., Parratt v. Taylor*, 451 U.S. 527 (1981) (review after entry of summary judgment for the plaintiff).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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